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# COMMUNICATION

## BBNJ Agreement and International Law of the Sea: Inheritance and Development

Ma Xinmin<sup>\*</sup>

After 19 years of negotiation, the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ) was finally adopted on 19th June 2023, and will be open for signature from 20<sup>th</sup> September 2023 to 20<sup>th</sup> September 2023. As the third implementing instrument of the United Nations Convention on the Law of the Sea (UNCLOS), the Agreement was formulated on the basis of the Convention and further develops it.

Today, I would like to share some of my personal observations on the relationship between the BBNJ Agreement and the UNCLOS. I would divide my speech into four parts. First, the background and significance of the BBNJ Agreement. Second, how the Agreement inherits and develops UNCLOS. Third, how the Agreement innovates and improves itself from the Convention. Fourth, suggestions on the formulation and implementation of the follow-up rules as well as the interpretation and application of the Agreement.

### 1. Background and Significance of the BBNJ Agreement

In 2004, the issue on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction (BBNJ) was formally incorporated into the United Nation's agenda. The same year, a BBNJ *ad hoc* Open-ended Working Group was established by the 59<sup>th</sup> session of the UN General Assembly (UNGA) to discuss and study feasible options for enhancing the conservation and sustainable use of BBNJ. Through 11 years of discussion and suggestions at nine meetings of the *ad*

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*hoc* Open-ended Working Group, the UNGA adopted Resolution 69/292 on 19 June 2015, deciding to develop an international legally binding instrument on BBNJ under the framework of the United Nations Convention on the Law of the Sea (UNCLOS) and to launch a preparatory committee (PrepCom) for negotiations. Two years later, based on Resolution 72/249 adopted on 24 December 2017, the UNGA decided to formally convene intergovernmental conferences (IGCs) in 2018 to negotiate and develop the instrument. After nearly 2 decades of unremitting efforts by all parties, the BBNJ agreement was finally concluded in March 2023.

As the most important achievement in law-making in the field of international law in recent years, the Agreement embodies the international community's consensus on addressing maritime risks and challenges through multilateralism, and further establishes rules and institutions for the conservation and sustainable use of biological diversity in the high seas and international seabed areas, which account for about 70% of the global oceans. The Agreement is yet another milestone in the history of the international law of the sea and opens a new chapter in international cooperation on marine biological diversity.

Through solidarity and cooperation, developing countries have made great contributions to the formation and conclusion of the Agreement. The Agreement includes the principle of *Common Heritage of Humankind* and embodies it in Article 11. The Agreement emphasizes the assistance to and the empowerment of developing countries, provides for a balanced and reasonable benefit-sharing mechanism for marine genetic resources and digital sequence information, stipulates the developed countries' obligation to make upfront financial contributions to the special fund established under the Agreement, and strengthens the financial and institutional guarantee for capacity building and transfer of marine technology for the benefit of developing countries. The Chinese government has all along actively participated in the negotiation process, stands firmly with the developing countries, supports their legitimate and reasonable demands, and plays a positive role in building a fair and just maritime order.

## 2. The Agreement inherits the UNCLOS

First, the Agreement upholds the fundamental status of UNCLOS. The Convention is the fundamental legal instrument on the modern maritime order and provides the ground for the basic framework and specific regimes embodied in the Agreement. The Agreement is an instrument to implement the Convention. The preamble to the Agreement stresses the need to respect the balance of rights, obligations and interests set out in the Convention. Article 2 of the Agreement explicitly provides for

the achievement of its objectives through effective implementation of the relevant provisions of the Convention and further international cooperation and coordination. Article 5 of the Agreement provides that it shall be interpreted and applied in the context of and in a manner consistent with the Convention and nothing in the Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. UNGA resolution 69/292 and 72/249 reaffirm that the Agreement should be fully consistent with the provisions of the Convention and should not undermine relevant legal instruments and frameworks as well as relevant global, regional and sectoral bodies.

Second, the Agreement upholds the international law framework of UNCLOS. Article 2 of the United Nations Charter elaborates the international law principle of respecting each countries' sovereignty, territorial integrity and political independence. Paragraph 4 of the Preamble to the Convention recognizes that the legal order established by the Convention is taking 'due regard for the sovereignty of all States, including the sovereign rights of coastal States in maritime areas under their jurisdiction. The modern maritime order is based on respect for national sovereignty and territorial integrity. Land dominates the sea is a universally recognized principle of the international law of the sea. The maritime rights and interests of a coastal State are derived from its sovereignty over continental and/or insular land territory. Therefore, respect for a state's sovereignty necessarily requests respect for its maritime rights.

The Agreement fully respects territorial sovereignty and maritime rights and interests which is enshrine in many articles throughout the its whole text. Preamble to the Agreement emphasizes respect for the sovereignty, territorial integrity and political independence of all States. Article 6 provides that the agreement, including any decision or recommendation of the Conference of the Parties (COP) or any of its subsidiary bodies, and any acts, measures or activities shall be without prejudice to, and shall not be relied upon as a basis for asserting or denying any claims to, sovereignty, sovereign rights or jurisdiction. Article 18 explicitly exclude the disputed areas from the application of area-based management tools (ABMT).

Third, the Agreement upholds the international maritime regime of UNCLOS. The Agreement explicitly applies to the high seas and international seabed areas, and conforms to the maritime zone regime as provided in the Convention. Article 5 of the Agreement also indicates that nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. The Agreement also clearly enshrines the two basic principles of Freedom of the High Seas and Common Heritage of Humankind, safeguards the integrity of the Convention and contributes

to the stability of the maritime order. The Convention provides that States carrying out activities in ABNJ shall exercise due regard to the rights of the coastal States, which is also inherited by the Agreement in its Article 22 paragraph 5.

Fourth, the Agreement upholds the marine environmental protection principles and concepts established by UNCLOS. Part XII of the Convention provides the general obligations and measures of the state parties to protect and preserve the marine environment as well as the obligation to conduct global and regional cooperation in this regard. It stipulates the obligations to monitor and report the risks or effects of pollution and conduct environmental assessment. The Agreement builds on and further elaborates these provision, and develops a series of regimes to implement them. It also draws on the universally recognized principles and approaches in international environmental law, such as the polluter-pays principle, precautionary approach, ecosystem approach, integrated approach to ocean management, and the obligation to prevent transboundary damage.

### **3. As the latest development of the modern law of the sea, the Agreement is an innovation and improvement of the Convention**

First, the Agreement establishes the rules for activities with respect to marine genetic resources and a benefit sharing mechanism, thus filling the gap of UNCLOS in this regard. Confined by the times, technology and recognition level of humankind, the Convention didn't provide any rules regarding the marine genetic resources in ABNJ. As the development of the science and technology, the values of the marine generic resources and digital sequence information were discovered which lead to a boom of the collection and generation of marine genetic resources and digital sequence information in ABNJ. It was the necessity to fill in the gap of the Convention regarding marine genetic resources that triggered the process to formulate the Agreement.

After nearly two decades of negotiation, the Agreement finally sets out the rights and obligations of the Parties in the various stages of the activities with respect to marine genetic resources and digital sequence information, such as the access, scientific research, commercialization, as well as in the fair and equitable sharing of benefits. Several institutional breakthroughs were made to achieve a delicate balance between the principle of freedom of high seas and the principle of the common heritage of humankind, as well as the developing countries and developed countries. One important achievement is that, for the first time in the governance of Global Commons, the Agreement explicitly provides for developed countries' specific obligation to make upfront payments to the special fund to assist the developing

countries to build capacity and upgrade technology in a monetary way. Another important achievement is that, for the first time, the Agreement comprises specific institutional arrangements on the issue of digital sequence information and its benefit sharing, which remain unresolved after long debate.

Attention should also be paid to the application scope. **Article 10 of the Agreement provides that the provisions shall not only apply to activities with respect to marine genetic resource and digital sequence information after the entry into force of this Agreement, but also extend to the utilization of marine genetic resources and digital sequence information before entry into force, unless a Party makes an exception in writing.** Meanwhile, the Agreement excludes fishing and fishing related activities regulated under international law, and fish or other living marine resources taken from fishing activities unless they are regulated as utilization of marine genetic resources. **Military activities will also not subject to this regime.** By providing extension and flexibility, this article makes it easier for both developing and developed countries to accept.

Second, the Agreement establishes criteria and procedures for the establishment of Marine Protected Areas (MPAs) and reinforces the obligations of States under UNCLOS to **protect and preserve the marine environment**. Before the Agreement, legal instruments, frameworks and bodies (IFBs) such as the Convention on Biological Diversity (CBD), the International Seabed Authority (ISA), the International Maritime Organization (IMO), the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and the Regional Fishery Management Organizations (RFMO) have already established different kinds of area-based management tools (ABMTs), including the Ross Sea MPA and the South Orkney MPA. However, those ABMTs and measures are mainly focus on the issues within their respective competences and fields.

For the first time in the history of the international law of the sea, the Agreement creates a **legal basis for the establishment of MPAs on a global scale**, which is regarded as **its most important “added value”**. It also differentiate the concepts of ABMTs and MPAs, by providing in the definition clause that the **ABMTs aim to strike balance between conservation and sustainable use while MPAs prioritize conservation**. The Agreement provides that the Parties may submit MPA proposals, which may be established by decision of the Conference of the Parties (COP) after preliminary review, public consultation and other procedures. **Once established, the Parties are obliged to comply** with the management measures. Activities such as shipping, fishing and deep-sea mining **may be subject to higher environmental standards**. But if the measures in the proposal fall within the competence of other IFBs, the COP

can only make suggestions to those IFBs and encourage them to adopt relevant measures. The Agreement also provides that the COP shall consult regularly with **other bodies on matters related to MPA**, so as to facilitate synergies in cross-cutting marine environmental protection activities.

Third, the Agreement enhances the **transparency and internationalization of Environmental Impacts Assessment (EIA) and concretizes the obligations of EIA under UNCLOS**. The EIA under the Agreement has been further developed on the basis of following the EIA threshold of UNCLOS and “*State-led and State-decision*” principle, which is mainly reflected in 3 aspects: **the tiered approach, the call-in mechanism and the strategic environmental assessment**. The tiered approach requires the Parties to conduct preliminary screening of activities according to the standard of “more than minor or transitory effects”. When the effects of the activities reach the threshold of “significant pollution or significant and harmful change” stipulated in UNCLOS, EIA will be triggered. And if activities within national jurisdiction may cause substantial pollution of or significant and harmful changes to the marine environment in ABNJ, **EIA either under the Agreement or consistent with national processes shall be conducted**. This approach will encourage the sponsors of marine activities to be more cautious about environmental effects. The call-in mechanism allows other Parties and the Scientific and Technical Body **to provide their views or recommendations** on the screening results or authorized activities, for the sponsoring Parties to consider. **However, the authority of final decision-making rests upon the sponsoring Parties. This arrangement strikes a good balance between State-leading and international intervention**. The Agreement also stipulates that all parties should consider conducting strategic environmental assessment, and advocates a holistic and comprehensive assessment of relevant ocean planning schemes.

Fourth, the Agreement strengthens the institutional and financial guarantee for capacity-building and **transfer of marine technology to developing countries**, and promoted substantive progress of the relevant UNCLOS regime. Although the Convention stipulates the obligation of the Parties to conduct capacity building and transfer of marine technology, it refers this obligation to current IFBs rather than establishes a specific mechanism to implement the obligations. Based on the rules and regimes established by the Convention, the Agreement reaffirms a long-term vision of the importance of **fully realizing technology development and transfer for inclusive, equitable and effective cooperation and participation**, which is shared by both developing and developed parties. In this regard, the Agreement further elaborates the modalities and types of capacity building and transfer of marine technology (CBTT) in article 42 to 44 as well as Annex II, establishes the CBTT Committee, and

sets up a special fund to provide mechanisms and financial guarantees for CBTT. It also emphasizes that consideration should be given to the national circumstances, interests and needs of developing countries, and strengthens respect for and protection of the indigenous peoples and their traditional knowledge. These provisions will help enhance the capacity of developing countries to participate in deep-sea and ocean governance, and promotes the building of a fair and just maritime order.

Besides the Convention, the CBD, the United Nations Framework Convention on Climate Change (UNFCCC), the IMO and the Intergovernmental Oceanographic Commission (IOC) also make relevant arrangements on capacity building and technology transfer. Through connecting several climate and bio-tech professional organizations, the Climate Technology Centre and Network (CTCN) under UNFCCC, and the Bio-Bridge Initiative under (CBD) established technology transfer networks to synergize resources effectively with needs, making them successful models for CBTT. The Agreement could further strengthen coordination and cooperation with the above mentioned IFBs, in order to achieve integration of information exchange and technology transfer networks, fully empower developing countries and realize the common goal of conservation and sustainable use of marine biological diversity.

Fifth, the Agreement innovates and develops the dispute settlement mechanism of UNCLOS, and confer advisory jurisdiction on the full court of International Tribunal for the Law of the Sea for the first time. Part XV of the Convention clearly established compulsory dispute settlement procedures together with limitations and exceptions. While effectively help resolving most of the global maritime disputes, Part XV also creates the risks of being abused and undermine the sovereignty, maritime rights and interests of the State Parties. The 1995 Fish Stock Agreement provides that the Part XV of the Convention to be applied *mutatis mutandis* equally to parties and non-parties of the Convention, which builds up obstacles for non-parties of the Convention to join. In order to achieve utmost universality, the Agreement draws on the Convention and the 1995 Fish Stock Agreement, and develops the disputes settlement mechanisms.

Besides the three categories of exclusive statements State Parties may make under Article 298 of the UNCLOS, the Agreement further excludes the jurisdiction of judicial bodies over disputes relating to the legal status of areas within national jurisdiction. The Agreement also confirms that, both the Parties and judicial bodies have the obligation not to prejudice sovereignty, sovereign rights or jurisdiction and related claims of States concerned, as well as the dispute settlement procedures agreed by the Parties under other instruments, frameworks and bodies.

Meanwhile, the Agreement is the first global legal instrument establishing advisory jurisdiction of the full court of International Tribunal for the Law of the Sea,



and defines the subject, procedure and scope of the requests for advisory opinions. It excludes disputes relating to territorial sovereignty and the legal status of areas within national jurisdiction, as well as matters within the competence of other instruments, frameworks and bodies. By doing this, the Agreement clarifies the *ratione materiae* of advisory jurisdiction from both positive and negative aspects.

Last but not least, the Agreement creates a series of new mechanisms and strengthens compliance and implementation of the Agreement. The Agreement decides to establish the COP, the Secretariat, the Scientific and Technical Body, the Clearing-House Mechanism, the Access and Benefit-Sharing Committee, the Implementation and Compliance Committee, the Capacity-building and Transfer of Marine Technology Committee, the Finance Committee, etc. All these mechanisms will equip the Agreement with “teeth”, so as to facilitate the full and effective implementation of its regimes.

#### **4. Suggestions on the formulation and implementation of the follow-up rules as well as the interpretation and application of the Agreement**

The conclusion of the Agreement is not an end, but a new starting point for international cooperation on marine biodiversity. There are many pending issues need to be settled, which concern 18 enabling clauses in total. **The effective implementation of the Agreement will depend on the comprehensive and accurate interpretation and application in good faith, as well as the development and functioning of various mechanisms and subsequent rules, and more importantly, the political mutual trust, solidarity and coordination of all parties.** To ensure the formulation and implementation of the follow-up rules of the Agreement proceed along the right track, and to achieve the final goal of conservation and sustainable use of marine biological diversity through global coordination and cooperation, following points should be carefully considered and followed.

First, **conservation and sustainable use should be balanced.** Both conservation and sustainable use of marine biodiversity are the overall objectives of the Agreement, which should be taken into account **equally rather than in an imbalanced manner.** When interpreting and applying the Agreement, the legitimate claims of States to **utilize the high seas and international seabed areas should be fully respected.** The establishment of MPA should be based on sufficient scientific evidence, and specific targets, management plans as well as duration should also be set in accordance with the marine ecological situation and human activities in certain sea areas, rather than banning all maritime activities arbitrarily. EIA should follow the *State-*

led, *State-decision* principle. Particularly, when improving transparency through internationalization, the rights of States to decide on the planned activities should be respected, and the excessive increase of costs of marine activities should be avoided.

Second, the interests of all countries, the international community as a whole and the humankind should be taken into account. All States, regardless of their size, geographical location or stage of development, enjoy rights and shoulder obligations in the high seas and the international seabed areas. We should accommodate the interests of all countries, while seeking the maximum commonalities and safeguarding the overall interests of the international community. Developing countries are disadvantaged in marine development and utilization, and more prone to be threatened by marine environmental challenges. Hence, when specifying the roadmap and scheme of benefit-sharing of marine genetic resources and CBTT in the future, we should take into consideration the special circumstances and needs of developing countries and the interests of humankind, including the interests of present and future generations.

Third, maximum efforts should be made to reach consensus in decision-making within the framework of the Agreement. All states share common interests and concerns with regard to the high seas and the international seabed areas. Only when decisions are made by consensus, can they be widely recognized and effectively implemented by all states. Hence, the parties should take other's concerns seriously and give them full consideration, spare no effort to promote the implementation of the Agreement through consensus in good faith, and refrain from resorting to voting casually. Although the 1994 Agreement relating to the Implementation of Part XI of the UNCLOS, the 1995 Fish Stocks Agreement and some other international instruments provide for voting mechanisms, but the parties have maintained good traditions of consensus and never rely on voting in practice. These precedents are worth learning from.

Last but not least, the relationship between the new rules and mechanisms and other rules and mechanisms should be properly handled. The Agreement is a complement to and improvement of the existing international rules and mechanisms, rather than a fresh start. Maritime activities such as shipping, fishing and seabed resource exploration have been effectively governed by existing rules and regulations. The principle of "not undermine" other international legal instruments, frameworks and bodies has been reiterated throughout the Agreement. This principle should be strictly followed during subsequent rule-making and implementation. Mutual reinforcement and coordination among various rules and mechanisms should be enhanced to jointly address global maritime challenges.



